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ABSTRACT

Although the Federal courts have displayed a notable concern for the potential effects of resegregation in their adjudication of disputes involving public aid to private schools, they have generally rejected the idea that the threat of resegregation should be taken seriously in drawing up desegregation plans for public school districts. The judicial attack on private schools has been unsuccessful in stemming their growth as alternatives to integrated public schools. Judicial action in approving desegregation plans has actually contributed to resegregation in some communities. Judges have a distinct problem in trying to assess which desegregation plans will produce maximum desegregation. On the one hand they know that school officials sometimes raise the specter of resegregation when white flight from the public schools is not really likely. On the other hand the white percentage actually declines when court ordered reassignment is instituted. A judge genuinely interested in the workability of alternative plans must determine what combinations of circumstances are most likely to produce resegregation without really having much information on which to base his decision. Social science, so far, has offered little help. The lower court must contend not only with the lack of information about resegregation, but must produce decisions acceptable to the Supreme Court as well. The Court's two goals of effectiveness and speed may be, under certain circumstances, contradictory. (Author/JM)

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DESEGREGATION, RESEGREGATION AND THE SOUTHERN COURTS

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In the eighteen years since "separate but equal" schools were declared unconstitutional, all school districts in the South have been required to end legally imposed segregation. Despite the bluster, the threats, and the violence that accompanied the fight to maintain the status quo, the absolute racial separation that once characterized public education in the South has almost ceased to exist. Although the level of real integration may be less than ideal, black and white children are today sitting in the same classrooms, and desegregated education appears to be here to stay -- in most school districts, that is.

In certain districts, however, black and white children have never sat in the same classrooms. Despite the demise of de jure segregation, every black child in these districts is attending an overwhelmingly black school. The reason: there are virtually no white children attending the public schools in these localities. Whites have deserted their public schools as blacks have entered those once reserved for white use only.

In other districts integration once appeared to have a chance to succeed. It has become quite apparent in recent years, however, that the likelihood of successful integration is in fact diminishing as significant numbers of white students leave the public schools of these communities each year. As the black proportion in the student bodies of the affected schools increases year after year, the schools become decreasingly attractive to the white community.

Whether resegregation comes about instantly, as has happened in some schools, or gradually, as in others, the result is the same: integration becomes an empty dream as black and white children go their separate ways

to school each day. A new duality in education replaces old-style segregation as black public school systems are forced to coexist with white private school systems in the same communities; as black city schools are increasingly surrounded by white suburban rings.

Because resegregation threatens in some areas to make the attainment of integration impossible, federal courts have, on several occasions, been called upon to deal with questions presented by the resegregation process. The purpose of this paper is to explore the policies of the courts in responding to these questions.

THE PATTERN OF RESEGREGATION

In September, 1971, there were 39 Southern school districts in which 90 per cent or more of the enrolled students were black.[1] All were rural districts in areas with heavy concentrations of black population. They were located in six states, with five in Alabama, nine in Arkansas, four in Georgia, sixteen in Mississippi, two in South Carolina, and three in Virginia. Over 81,000 pupils, 96 per cent of them black, were enrolled in these schoools, which had become, in effect, resegregated.

Some of these schools lost their white students as soon as legally imposed segregation was ended. Prince Edward County, Va., for example, gained national notoriety when its schools were closed to avoid integration in 1959. Since the schools were reopened in 1964 few white students have chosen to attend. The schools of Prince Edward County have remained overwhelmingly black, 93.7 per cent in 1971.[2]

In Holmes County, Miss., on the other hand, a sufficient number of white children remained in the public schools during the first years of integration to make a small amount of race-mixing in the classrooms possible. In September, 1968, 186 of the county's 5654 black school children were enrolled in majority-white schools.[3] Ironically, even this small degree of integration came to an end when the county was required to abandon its "freedom of choice" desegregation plan on the grounds that it had failed to bring about integration.[4] By September, 1971, only eight white children were enrolled in the public schools of Holmes County.[5]

In contrast to those communities in thich the schools have already been effectively resegregated, certain others may be identified as possessing

schools which are in the process of resegregating -- i.e., although a substantial number of white students remain within the public school systems, there is a pronounced trend toward increased black percentages. Typically, some of the individual schools in these districts have already become resegregated, changing from predominantly white to predominantly black within the space of a few years.

In the absence of a thorough, computer assisted study, it is impossible to determine precisely how many school districts belong in this category. Leaving that work for future study, it will suffice at this time to point to some clear examples of the resegregation process.

In Richmond, Virginia, the declining proportion of white children in the public school enrollment has a long history. According to figures introduced into the Richmond school consolidation trial, the white percentage in the city's public schools had dropped from 70.1 in 1919 to 56.5 in 1954, a decrease of slightly less than 15 per cent. In the years since the Brown decision, and especially since the city's schools were desegregated in 1960, the white decline has been even more pronounced: by 1971 only 30 per cent of Richmond's school children were white-- a decline of over 26 per cent in 17 years.[6]

It may be instructive to look at the racial complexion of some individual schools. In 1970, the first year of busing, Greene elementary school had an enrollment of 93 per cent white. In 1971, with increased busing, whites comprised 41 per cent of the school's student body. This year only 27 per cent of the students are white. Formerly all black schools, of course picked up white enrollment during this period.

The student body of George Mason elementary school, for example, was all black in 1970, 18 per cent white in 1971, and 27 per cent white in 1972.[7] Although the racial movement is not unidirectional, it is predominantly away from white enrollment in the public schools: this fall six of Richmond's elementary schools had an increase over last year in the percentage of white children enrolled; in three the white proportion remained constant; but in 27 the percentage of white children actually declined.[8]

The public schools of Atlanta have had a similar experience. When the city's public schools were desegregated in 1961, 58 per cent of the students were white. By 1971 only 28.5 per cent of Atlanta's public school students were white.[9] During that period 34 schools changed from all white to 90 per cent or more black.[10]

While the resegregation process has progressed faster in these cities than in most others, its impact is by no means limited to them. In New Orleans 73.6 per cent of the public school students in 1971 were black, an increase of 5 per cent in only three years. Petersburg, Virginia, with 71.8 per cent of its students black, had an 8 per cent increase in the same period.[11] Dallas, Houston, Nashville and Norfolk, which still have majority white school systems, each lost several thousand white students between 1970 and 1971 while the number of black pupils remained stable or increased.[12]

Where do the white students go? Assuming that formal education is required either by law or by parental values, the white exodus from public schools can occur only if alternative schools are reasonably

available. In metropolitan areas the alternative schools have been found largely in the predominantly white suburbs. In smaller towns and rural areas white parents have turned to hastily established private schools as an alternative to integrated education.

Several large Southern cities, like their Northern counterparts, are on the verge of becoming the "black centers of white doughnuts." Richmond, for example, is the core for a metropolitan area of over one-half million people, less than half of whom actually reside within the city limits. Forty-two per cent of the city dwellers are black. In New Orleans a net total of 65,000 white residents left the central city between 1960 and 1970 to be replaced by 33,000 additional blacks.

Dissatisfaction with school integration certainly is not the only reason for the white flight from central cities. Suburbia existed in the South long before integrated schools. It is a well-documented fact, however, that school problems are among the factors contributing to the massive exodus of whites from certain cities and their public schools.[13] "Freedom is Bon Air," one Richmond housewife was heard to say -- freedom not just from high property taxes but from busing as well.

White residents of smaller towns and rural areas with large black populations generally lack the convenient refuge of white suburbia. "One thing's for sure," Hodding Carter III of Greenville, Mississippi, observed when freedom of choice ended in his community, "there won't be any flight to white suburbia down here. Where do you go? Hollandale? It's 80 per cent black. Itta Bena? It's more."[14]

In many communities most of the white students remained in the public schools. Yet across the South

> "segregation academies" sprang up like dandelions, many in worn-out buildings ripe for razing, many with shabby second-hand furnishings and equipment, many with less than qualified teachers.
>
> The finished product was christened "quality education."[15]

The Southern Regional Council estimated that as many as half-a-million white children were attending segregated private schools during the 1970-71 school year.[16] Since that critical year when "freedom of choice" was abandoned in most Southern districts, some of the private academies have closed. Many, on the other hand, have flourished, taking on an air of permanence as new buildings have been constructed, school "traditions" established, and community status acquired.

Resegregation is dangerous in rural areas "because it threatens to create virtually all-black public school systems -- poorly supported by public funds -- in isolated and easily forgotten areas."[17] In urban areas it contributes to "white flight" out of the central cities, as whites desert the increasingly black schools that they consider inferior to suburban schools.[18] The end result in all areas is inferior schools as states decrease financial support, generally tied to average daily attendance or enrollment, and citizens lose interest in the schools.[19] Integration becomes an unattainable goal as one type of segregation is exchanged for another.

RESEGREGATION AND THE LAW

Since the beginning of the federal attack on school segregation, the U.S. Supreme Court has held that the primary responsibility for supervising the transition to integrated education must rest with the federal district courts "because of their proximity to local conditions and the possible need for further hearings."[20] The Southern district courts, of course, have carried the greatest share of the desegregation case load. The job of supervising the handling of these cases has rested primarily with the circuit courts serving the Southern region. Although the task has been odious to some of the judges unable to overcome their predilection for the "Southern way of life," the Southern courts have effectively presided over the elimination of legally imposed segregation in the South, supplying detailed legal interpretation to supplement the broader guidelines enunciated by the Supreme Court.[21]

Law has been used effectively to break down the barriers to black enrollment in formerly white schools. However reluctant the judges may have been initially, the Southern courts have participated in the process. It has been established, however, that resegregation has frustrated or is threatening to frustrate the achievement of integration in many localities. Has the power of the federal judiciary been brought effectively into play to combat this threat to equality of educational opportunity? It is this question to which we now turn.

Before the judiciary may involve itself in a political dispute, of course, a complaint must be brought by an aggrieved party. Of those cases

involving the resegregation phenomenon brought to the attention of the federal courts, we may denote three categories: those concerning the closing of public schools, public subsidies to segregated private schools, and desegregation plans for public school systems.

The first category is really a phenomenon of the past rather than the present. Closing schools to avoid integration was an integral part of Virginia's plan of "massive resistance," but legal and political processes combined to bring about the relatively early reopening of the first schools closed and the abandonment of the policy on the state level.[22] One county presented a problem, however. Prince Edward County closed its schools in 1959 and kept them closed through several years of litigation. In 1962 a district court ordered the schools reopened, only to be overruled by the Fourth Circuit Court of Appeals, which found no affirmative duty for the maintenance of public schools. The schools were reopened only after the U.S. Supreme Court made a final determination in 1963.[23] This decision by the Supreme Court effectively determined the fate of efforts to close public schools to maintain segregation.[24]

Since the beginning of the desegregation struggle, segregationists have tended to look upon private schools as the ultimate refuge from public school integration. Even after extended legal battles had been lost and black children had begun to enter the doors of formerly white schools, whites could still flee to separate school systems -- private schools established expressly to preserve the separation of the races. But education is expensive and most families lack the financial resources necessary to support private schools. If part of the burden could be lifted off their shoulders and placed upon the state governments, the establishment and

maintenance of private schools would be considerably facilitated. Diehard segregationists, consequently, have placed a great deal of emphasis on winning and keeping public subsidies of one kind or another for their private schools.

Integrationists, on the other hand, have tended to perceive private schools as the most dangerous single threat to successful integration. Seeking to deprive private schools of public support, they have brought a series of cases to the federal courts, and they have enjoyed a high degree of success. In deciding these cases, the federal judges have displayed a high level of awareness and concern about the potential that private schools hold as instruments of resegregation.

One of the earliest schemes developed to provide public subsidies to private schools was the plan, adopted by several state legislatures, to provide tuition grants directly to families whose children were enrolled in private institutions. Although the courts were initially hesitant to declare the tuition payment plans unconstitutional on their face, they agreed that the payments must be considered unconstitutional if they had the effect of preserving segregation in education. "This court is of the opinion that such payments would be unconstitutional where they are designed to further or have the effect of furthering said segregation in the public schools," a three-judge panel in Alabama ruled in 1964.[25] More recently courts have been willing to consider the tuition grants ipso facto unconstitutional on the grounds that they inevitably contribute to the preservation of segregated schooling.[26]

Federal courts have also been called upon several times to deal with less direct forms of state subsidy to private schools. In these instances, also, the courts have acted to cut off state aid to the private institutions -- whether the aid took the form of sale of state property to the schools,[27] continued salary payments to teachers who had abandoned their jobs in the public schools,[28] or free use of city recreational facilities.[29] In the most recent of these cases, the court denied the right of a municipality to provide any aid whatsoever to a segregated private school. The amount and the form were irrelevant, the court insisted:

> The Court is unable to distinguish the present case from those cases which struck down state statutes providing tuition grants to students attending private schools. . . . The Court considers irrelevant the amount of city aid provided to the private schools.[30]

In allowing segregated schools to use publicly owned recreational facilities on the same basis as other private organizations, the city of Montgomery, Ala., was declared to be guilty of "encouraging and facilitating their establishment as an alternative for white students who in most cases are seeking to avoid desegregated public schools."[31]

Civil rights forces have lost only one case dealing with state aid to segregated private schools. In April, 1972, a federal panel in Mississippi rejected the argument that the state should be prohibited from furnishing free textbooks to pupils in private schools. The court upheld the policy on the grounds that Mississippi had historically provided free textbooks to all educable children.[32]

Although the Southern courts have not been directly involved in the litigation concerning it, one other form of public subsidy to private

education deserves mention. The federal government has facilitated the establishment and continued operation of private schools by granting income tax exemptions to the schools and tax deductions to their contributors. Responding to growing criticism of this policy, the Internal Revenue Service announced in July, 1970, that tax advantages would no longer be made available to segregated schools. To qualify in the future private schools would be required to furnish public assurance of racially non-discriminatory policies.[33] It soon became clear, however, that government policy would be to accept such assurance at face value. Public assurance since that time has been, more often than not, an inconspicuous notice in the local newspaper with little or no action to support it.

In June, 1971, a group of black parents from Mississippi won a significant battle against this federal subsidy for private schools. The U.S. District Court for the District of Columbia ordered the IRS to require private schools in Mississippi to support their assurance of non-discrimination with objective evidence before granting them any tax advantages. The history of the private school movement in Mississippi, the court declared, placed a "badge of doubt" upon the schools. The court insisted, furthermore, that the requirement of objective evidence should be "applicable to schools outside Mississippi with a same or similar badge of doubt." The decree itself would be limited to schools in Mississippi, however, because the action had been brought specifically in behalf of children and parents in that state.[34]

Although the IRS has the authority to do so, it has shown no inclination to apply this policy outside Mississippi.[35] The Service had, however, revoked the tax exempt status of 41 private schools, 33 of them in Mississippi, by August, 1972, and was considering the revocation of 64 others.[36]

It is clear from an examination of judicial opinions that the primary reason for the courts' rejection of state aid to private schools has been the judges' belief that such aid inevitably contributes to resegregation. The Southern courts have definitely shown a willingness to utilize their power to combat the growth of segregated private schools as alternatives to integrated public schools, but the effectiveness of their policy has been questionable, to say the least. Perhaps the courts have succeeded in restraining the growth of private alternative schools, but they have by no means been able to arrest it. Segregated private schools continue to thrive across the South.[37]

In the third category of cases to come before them -- those involving desegregation plans for public school systems -- the federal courts have, with a few notable exceptions, been unwilling to consider the threat of resegregation as a legally significant fact. Typically, the defendant school officials have argued that to institute the plan proposed by the plaintiffs would be to invite "white flight" from the public schools, with the result a predominantly black school system. Typically, the courts have rejected their argument.

The U.S. Supreme Court established the tone of these rulings in 1968 when it ordered the elimination of "freedom of choice" in Jackson, Tenn. Officials of the school system, in which about 40 per cent of the pupils were black, contended that the implementation of any plan stronger than "freedom of choice" would lead to the wholesale withdrawal of white students from the public schools of the city. The Supreme Court dismissed their argument with a quotation from Brown II: "But it should go without saying that the validity of these constitutional principles cannot be

allowed to yield simply because of disagreement with them." Having failed to produce a truly integrated school system, the "freedom of choice" plan could no longer be permitted, the court declared.[38]

Although the rejection of "freedom of choice" in this companion case to Green v. New Kent[39] was a break with precedent, the rejection of community hostility as an excuse for inaction was quite consistent with earlier rulings. In Brown II, as noted above, the court had explicitly ruled out community hostility as a consideration in "deliberate speed" integration.[40] Three years later the court had elaborated on this policy, again excluding hostility as a legitimate legal consideration.[41] Again, in a case involving the closing of city parks, the court had declared: "The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled."[42] Clearly, speculation about resegregation was not to be considered an overwhelmingly compelling reason."

Federal courts in the South have generally followed this reasoning with respect to the threat of resegregation. In 1972, for example, the Fourth Circuit Court of Appeals dismissed with scant comment the contention of the Norfolk, Va., school board that a proposed busing plan was unworkable because it would lead to increased white flight.[43]

During the summer of 1971 the Fifth Circuit Court was called upon to rule on several cases involving the closing of black schools, the former students of which were being sent to formerly white schools.[44] In each case the local school board had closed the formerly black schools on the assumption that whites would refuse to attend them. The court rejected

this assumption as proper grounds for terminating the use of school buildings. Schools could be closed, the court agreed, for non-racial reasons, but not because of racially motivated fears:

> While it is undisputed that a particular school may be terminated for sound educational reasons, an otherwise useful building may not be closed merely because the school board speculates that whites will refuse to attend the location. Such action constitutes racial discrimination in violation of the Fourteenth Amendment.[45]

Closing schools for racial reasons had previously been ruled impermissable, the court pointed out, because it "places the burden of desegregation upon one racial group."[46]

In separate opinions Judges J.P. Coleman and Charles Clark strongly disagreed with their colleagues on the bench. On pragmatic grounds they insisted that wide leeway should be allowed in developing desegregation plans that promise to work -- to get black and white children into the same classrooms. In Lee v. Macon County Judge Coleman made clear his "opposition to unrealistic plans, doomed to failure from the beginning."[47] Judge Clark set forth his views in a special concurring opinion in Bell v. West Point:

> The . . . plan has one controlling virtue found in too few court-mandated school operations of any racial makeup; it has worked! . . . This majority black school district is the sole such example known to me which has been able to move from a totally segregated past to a totally integrated present, while preserving a disciplined atmosphere in which education for pupils of both races has been afforded. (emphasis in original)

Agreeing that school closings for purely racial reasons could not be tolerated, he virtually invited the district court to find some "supportable . . . non-racial ground" upon which to uphold them.[48]

Few of the Southern judges have evinced such a pragmatic bent. In dealing with the threat of resegregation most have followed strictly the

dictum of the Supreme Court in Brown II: that local hostility may not be allowed to frustrate the enjoyment of Constitutional rights.[49] As shown above, this has generally been interpreted as requiring that the threat of resegregation not be allowed to influence the courts' decisions. There have been exceptions, however.

The effect of resegregation on the public schools of Atlanta has already been noted.[50] The school board of that city has been involved in litigation since 1958, the most recent issue being whether to institute a policy of racial balancing implemented by busing. The threat of further resegregation has been the primary consideration in the refusal, so far, of the federal district court to order a busing program for the Atlanta schools. Thus, in 1971, Judges Sidney O. Smith and Albert J. Henderson, Jr., declared: "The problem is no longer how to achieve integration, but how to prevent resegregation." Busing was rejected, the court declared, because it would not work -- far from producing integration, it would have the opposite effect:

> Atlanta now stands on the brink of being an all-black city. A fruit-basket turnover through bussing [sic] to create a 30% white - 70% black uniformity throughout the system would unquestionably cause such a result in a few months' time. Intelligent black and white leadership in the community realizes and fears it. Responsible citizens both in and out of the school system are deeply concerned with the preservation of the biracial identity of the city. Without it, the ultimate goal of equality in all its aspects is doomed and Atlanta's position of leadership is severely threatened.[51]

Having been instructed by the appellate court to consider the impact of Swann[52] on the Atlanta case,[53] the district court determined that Swann held no relevance for cases of de facto segregation, ruling furthermore that Atlanta's segregation was de facto rather than de jure.[54] Although the

case was remanded again,[55] the district court nas refused for a second time within a year to order busing, on the grounds that it "would simply speed up the transition of Atlanta to an all black school system."[56]

In a rather different situation involving schools in West Memphis, Ark., a district court determined that racial balancing could be a useful tool to be employed in combating resegregation. Faced with the task of developing a plan for the complete desegregation of a school district about 48 per cent black, Judge Garnet Thomas Eisele placed his primary emphasis upon the workability of his plan. White people, accustomed to majority status, Judge Eisele declared, have serious difficulty adjusting to situations in which they are in the minority. Therefore, resegregation is inevitable in schools in which whites are placed in a "disproportionate minority." To make sure that whites would not flee from the schools to which they were assigned, the court ordered the school board not to assign a minority of less that 30 per cent of either race to any school.

> The problem here . . . is not the actual percentage figures in the plan so much as it is the workability, or prospects of success, of the plan. It is true that the slight percentage changes required, as a minimum, by the Court's order will not guarantee the success of the plan but those changes, when coupled with the requirement to maintain minority percentages at 30 per cent or above, do increase the probability of success. [emphasis in original]

To assure that resegregation would not undermine the operation of the desegregation plan, the school board would be required to implement a plan designed to minimize pressures for resegregation and, furthermore, to make periodic adjustments if whites did refuse to attend the schools to which they were assigned.[57]

U.S. District Judge Robert R. Mehrige attracted national attention in early 1972 when he issued an order for the merger of the predominantly black Richmond, Va., school system with the predominantly white school systems of suburban Henrico and Chesterfield Counties.[58] The fundamental reason for Judge Mehrige's action was his concern over the effects of resegregation on the Richmond school system.

Although a plan of metropolitan school consolidation for racial reasons has not yet been put into practice in the United States, the concept itself has been around for some time. In 1967 the Civil Rights Commission pointed to school district organization as one of the principal causes of continued school segregation in large cities.[59] As early as 1968, according to the former chairman of the Richmond school board, members of the board were discussing metropolitan consolidation as a potential means of fighting resegregation. By 1970, after receiving a letter from Judge Mehrige suggesting that they give consideration to merger, members of the Richmond school board began discussions with suburban school officials, deciding in August of that year to move through legal processes for merger. "It was all very simple when you think about it in terms of the future of Richmond schools," the former school board chairman recalled two years later. "You look at where the children are, where the blacks are, where the whites are, you think about how you get the two together."[60]

Judge Mehrige agreed. "The departure of whites, as has occurred in the City, in the face of an increasing black component was predictable," he wrote, "but it was only possible -- and only had reason to occur -- when other facilities not identifiable as black, existed within what was in practical terms for the family seeking a new residence, the same community."[61]

Although the resultant segregation was different in its origin from the segregation of the past, the court observed, the impact was the same:

> The housing of a great majority of the black children in the metropolitan area within boundaries which place them in 70 per cent or more black schools, at a time when 90 per cent white schools operated just across the line, has the same impact upon self-perception and consequent effect on academic achievement as that of official segregation as it existed in 1954.

For white and black children alike "there is no appropriate substitute for desegregated schools," the court insisted. "Those that are not desegregated are simply not equal to those that are."[62]

Relying heavily upon the testimony of Dr. Thomas Pettigrew, a Harvard social-psychologist, Judge Mehrige concluded that the ideal black proportion in a school was 20-40 per cent. Below 20 per cent the black presence is token.

> When the black population of a school rises substantially above 40 per cent, it has been Dr. Pettigrew's experience that white students tend to disappear from the school entirely at a rapid rate, and the court so finds.
>
> . . . . . .
>
> Research tends to indicate that truly equal education opportunity cannot be offered by schools which are desegregated only to re-segregate. The transitional process is rarely productive. The effort to desegregate turns out to have been only a temporary gesture.

The only hope to bring about the optimum mix, the court ruled, would be metropolitan consolidation, which would put 97 per cent of the area's black students and 92.5 per cent of the whites in properly integrated schools.[63]

Judge Mehrige's decision has since been overturned by the Fourth Circuit Court of Appeals, which determined that the district court

lacked the authority to order the merger.[64] The final decision in this important matter, of course, will rest with the U.S. Supreme Court. One thing is certain, however: there will be very little integration in the nation's large cities if metropolitan consolidation does not become a widespread practice.

CONCLUSION

Although the federal courts have displayed a notable concern for the potential effects of resegregation in their adjudication of disputes involving public aid to private schools, they have generally rejected the idea that the threat of resegregation should be taken seriously in drawing up desegregation plans for public school districts. The judicial attack on private schools has been unsuccessful in stemming their growth as alternatives to integrated public schools. Judicial action in approving desegregation plans has actually contributed to resegregation in some communities. The irony of the situation is this: by ordering more integration a court may produce less, as whites flee from a public school system they come to view as intolerable.

This is precisely what has happened in Richmond, although it could be argued that the court there, by ordering racial balance, simply stimulated a process already in motion. With the busing plan he had already ordered into effect, Judge Mehrige observed frankly, "educational experts foresee that the black percentage in the city system will become larger at an even faster rate than before" unless metropolitan consolidation is also accomplished.[65] In Holmes County, Miss., all integration came to an end when a plan of "total integration" was put into effect.

Judges have a distinct problem in trying to assess which desegregation plans will produce maximum desegregation. On the one hand they know that school officials sometimes raise the specter of resegregation when white flight from the public schools is not really likely. In Calhoun

County, Ala., for example, the white percentage in the public schools actually increased almost three per cent after a pupil reassignment plan was adopted[66] over the protests of local school officials. In Norfolk, Va., on the other hand, the white percentage declined over three per cent when court ordered reassignment was instituted.[67] A judge genuinely interested in the workability of alternative plans must determine what combinations of circumstances are most likely to produce resegregation without really having much information on which to base his decision. Social science, so far, has offered little help.

The lower court judge must contend not only with the lack of information about resegregation, he must produce decisions acceptable to the Supreme Court as well. On the one hand, that body has instructed the lower courts to produce results: "The obligation of the district court . . . is to assess the effectiveness of a proposed plan in achieving desegregation;"[68] and "The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation."[69] On the other hand, the Supreme Court has placed an emphasis on speed in effectuating the transition to integrated education: an acceptable desegregation plan must not only promise to work, it ruled in Green v. New Kent, it must promise "to work now." [emphasis in original][70]

Under certain circumstances, the two goals of effectiveness and speed may be contradictory. It is easy to understand the Supreme Court's frustration at years of unnecessary inaction under the "deliberate speed" doctrine. Yet the reality is that in some localities there is

no plan for total desegregation that can promise "realistically to work . . . and to work now." A plan to produce optimum integration in these communities is the best that can be realistically expected.

The problem for the courts is to distinguish these communities from others, where immediate total desegregation will work. Perhaps the job could be handled more effectively through an administrative agency such as HEW than through the courts. The keys to the application of a policy designed to assure optimum integration are flexibility and skill -- flexibility in setting requirements and skill in determining when and where to push.

In some localities metropolitan school consolidation, supported by busing, is the only hope to produce integration. In other communities it would be useless. In some communities, "freedom of choice" might produce optimum integration. In others government provided education vouchers, usable in private schools which accept a minimum number of black students, might be the only way to get blacks and whites together in any classrooms. The pursuit of a single goal -- optimum integration -- supported by flexible policies might produce a breakthrough that has so far seemed unattainable in too many communities.

The situation calls for a bold policy of "social engineering," the design and application of public policy specifically for the attainment of a predetermined goal. Despite the allegations of the right wing to the contrary, the federal courts have not really treated school integration as a matter for "social engineering." In their failure to do so, they have inadvertantly injured the cause of racial equality in many localities as they have attempted to promote it.

NOTES

[1] Racial enrollment data supplied to the author by the U.S. Department of Health, Education, and Welfare, Office for Civil Rights, in computor printout, "1971 Survey Districts: Districts Ranked by Minority Group Enrollment."

[2] Ibid..

[3] U.S. Department of Health, Education, and Welfare, Office for Civil Rights, Directory of Public Elementary and Secondary Schools in Selected Districts: Enrollment and Staff by Racial/Ethnic Group, Fall, 1968 (Washington, 1970).

[4] Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969).

[5] Supra., note 1.

[6] Bradley v. School Board of the City of Richmond, 338 F. Supp. 67, 184-185 (E.D. Va. 1972).

[7] 1970 figures, ibid., at 232-233. 1971 and 1972 figures from Richmond Times-Dispatch, August 30, 1972.

[8] Richmond Times-Dispatch, August 29, 1972.

[9] Atlanta Constitution, November 4, 1971.

[10] Figure cited in Calhoun v. Cook, 332 F. Supp. 804, 806 (E.D. Ga. 1971).

[11] Supra., note 1.

[12] Table furnished by Department of Health, Education, and Welfare, Office for Civil Rights, "Negro Pupils in 76 of the 100 Largest (1970) School Districts."

[13] U.S. Commission on Civil Rights, Racial Isolation in the Public Schools (Washington, 1967), vol. I, p. 31.

[14] Quoted by Willie Morris, Yazoo: Integration in a Deep-South Town (New York, 1971), pp. 189-190.

[15] Atlanta Constitution, May 13, 1971.

[16] Kitty Terjen, "White Flight: The Segregation Academy Movement," in Southern Regional Council, The South and Her Children; School Desegregation, 1970-71 (Atlanta, 1971), p. 69.

17 Paul M. Gaston, "The Region in Perspective," in ibid., p. 16.

18 On public perception of predominantly black schools, see supra., note 13, vol. I, pp. 104 ff.

19 Frank R. Parker, "Federal Boost for Segregation," Civil Rights Digest, I (Fall, 1968), pp. 24-26.

20 Brown v. Board of Education of Topeka, 349 U.S. 294, 299 (1955). The principle was reiterated as recently as 1971; Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 12 (1971).

21 See Jack W. Peltason, Fifty-eight Lonely Men: Southern Federal Judges and School Desegregation (New York, 1962).

22 For a brief review of "massive resistance" see J. Harvey Wilkinson, Harry Byrd and the Changing Face of Virginia Politics, 1945-1966 (Charlottesville, 1968), pp. 113-154.

In January, 1959, a federal district court ordered closed Norfolk schools reopened; James v. Almond, 170 F. Supp. 331 (E.D. Va. 1959); and the U.S. Supreme Court dismissed the appeal, 359 U.S. 1006 (1959).

23 Allen v. County School Board of Prince Edward County, 207 F. Supp. 349 (E.D. Va. 1962); rev. sub nom. Griffin v. Board of Supervisors of Prince Edward County, 322 F. 2d 332 (4th Cir. 1963); aff'd. sub nom. Griffin v. Board of Education of Prince Edward County, 377 U.S. 218 (1963).

24 For an unsuccessful later attempt to close schools, see Lee v. Macon County Board of Education, 231 F. Supp. 743 (M.D. Ala. 1964); aff'd. per curiam sub nom. Wallace v. United States, 389 U.S. 215 (1967).

25 Ibid.

26 In 1965 a three-judge panel in Virginia ruled that the state could legitimately provide tuition grants to students in a private school as long as this aid was not the primary financial support of the school -- i.e., if the school were one which could operate without state support. Thus, the court reasoned, the state would not be enabling the segregated school to exist.

In the light of subsequent rulings in Louisiana and South Carolina, upheld by the Supreme Court, the same Virginia court ruled four years later that no state grants were permissable. Griffin v. State Board of Education, 239 F. Supp. 560 (E.D. Va. 1965); 296 F. Supp. 1178 (E.D. Va. 1969).

See also, Poindexter v. Louisiana Financial Assistance Commission, 296 F. Supp. 686 (E.D. La. 1968); aff'd. per curiam sub nom. Louisiana Educational Commission for Needy Children v. Poindexter, 393 U.S. 17 (1968); Brown v. South Carolina State Board of Education, 296 F. Supp. 199 (D. S.C. 1968); aff'd. per curiam 393 U.S. 222 (1968); Coffey v. State Educational Finance Commission, 296 F. Supp. 1389 (S.D. Miss. 1969).

27 Hall v. St. Helena Parish School Board, 197 F. Supp. 649 (E.D. La. 1961); aff'd. per curiam sub nom. St. Helena Parish School Board v. Hall, 368 U.S. 515 (1962).

28 U.S. v. Tunica County School District, 323 F. Supp. 1019 (N.D. Miss. 1971), aff'd. 440 F. 2d 377 (5th Cir. 1971).

29 Gilmore v. City of Montgomery, 337 F. Supp. 22 (M.D. Ala. 1972).

30 Ibid., at 24.

31 Loc. cit.

32 Norwood v. Harrison, 340 F. Supp. 1003 (N.D. Miss. 1972).

In 1961 a federal court in Louisiana had pointed to the state's policy of providing free textbooks to children in all schools as a proper exercise of state authority as it rejected other forms of aid to segregated private schools. Hall v. St. Helena Parish School Board, supra., note 23.

33 New York Times, July 11, 1970.

34 Green v. Connally, 330 F. Supp. 1150, 1174 (D.D.C. 1971); aff'd. per curiam sub nom. Coit v. Green, 404 U.S. 977 (1971).

35 U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort: One Year Later (Washington, November, 1971), p. 109.

36 Communication with the author dated August 16, 1972.

The author has serious misgivings about the effectiveness of accepting at face value the assurances given by schools outside Mississippi. The misgivings were heightened recently when he read that tax exempt status had been granted to Barnesville Academy in Barnesville, Georgia, a "segregation academy" with which the author has had personal experience. Atlanta Constitution, June 24, 1972.

37 Certainly the federal government's policy of granting tax benefits has contributed to this development. Beyond doubt, however, it is the determination of families to keep their children in private schools, even at considerable financial sacrifice, that has been primarily responsible for the continued operation of the schools.

38 Monroe v. Board of Commissioners of the City of Jackson, 391 U.S. 450 (1968).

39 391 U.S. 430 (1968).

40 Brown v. Board of Education of Topeka, 349 U.S. 294 (1955).

41 Cooper v. Aaron, 358 U.S. 1 (1958).

[42] Watson v. Memphis, 373 U.S. 526, 533 (1963).

[43] Brewer v. School Board of City of Norfolk, 456 F. 2d 943 (4th Cir. 1972).

[44] Gordon v. Jefferson Davis Parish School Board, 446 F. 2d 266 (5th Cir. 1971); Bell v. West Point Municipal Separate School District, 446 F. 2d 1362 (5th Cir. 1971); Lee v. Macon County Board of Education, 448 F. 2d 746 (5th Cir. 1971).

[45] Bell v. West Point, ibid., at 1363.

[46] Brice v. Landis, 314 F. Supp. 974 (N.D. Calif. 1969).
Similar rulings were made in Swann v. Charlotte-Mecklenberg Board of Education, 328 F. Supp. 1346 (W.D. N.C. 1971) and Moses v. Washington Parish School Board, 330 F. Supp. 1340 (E.D. La. 1971).

[47] Supra., note 44, at 756.

[48] Supra., note 44, at 1363-1364.

[49] Supra., note 40.

[50] Supra., p. 5.

[51] Supra., note 10, at 804, 806, 808.

[52] In Swann, supra., note 20, the Supreme Court authorized the use of busing to overcome the vestiges of legally imposed segregation.

[53] Calhoun v. Cook, 443 F. 2d 1174 (5th Cir. 1971).

[54] Supra., note 10, at 808-809.

[55] Calhoun v. Cook, 451 F. 2d 583 (5th Cir. 1971).

[56] New York Times, June 9, 1972.
The court is now being asked to consider the consolidation of Atlanta's schools with those of its suburbs; New York Times, June 8, 1972. Judges Smith and Henderson had earlier suggested that thought be given to the creation of a metropolitan school system; supra., note 10, at 809-810.

[57] Yarbrough v. Hulbert-West Memphis School District No. 4, 329 F. Supp. 1059, 1066 (E.D. Ark. 1971).
The court suggested that the school board go farther toward a racial balance of 52 per cent white and 48 per cent black in each school.

[58] Supra., note 6.

[59] Supra., note 18, vol. I, p. 17.

[60] Mrs. W.H. Crockford, interviewed in the Richmond Times-Dispatch, June 18, 1972.

For a description of the resegregation process in Richmond, see supra., pp. 4-5.

[61] Supra., note 6, at 91.

[62] Supra., note 6, at 198, 212.

[63] Supra., note 6, at 194-197.

[64] Wall Street Journal, June 13, 1972.

[65] Supra., note 6, at 197.

[66] Calhoun County was the defendant in Lee v. Macon County, supra., note 44.

Data from U.S. Department of Health, Education, and Welfare Table, "School Districts Which Implemented Student Reassignment Plans for the 1971-72 School Year," supplied to the author by the Office for Civil Rights.

[67] This involved the loss of over 5,000 white pupils.

Data from ibid.

[68] Green v. New Kent County Board of Education, supra., note 39, at 439.

[69] Swann v. Charlotte-Mecklenberg Board of Education, supra., note 20, at 26.

[70] Supra., note 39, at 439.